No. 80653-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LORETTA L. ERIKSEN, Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. Identity of Respondent

Respondent, State of Washington, Ann L. Stodola, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. Decision and Relief Requested

Respondent asks this court to deny Eriksen's request to review the Whatcom County Superior's Court decision denying her RALJ appeal and upholding the judgment of the Whatcom County District Court.

C. Fact Relevant to Motion

Officer Mike McSwain, Lummi Law & Order, was on duty on August 10, 2005. (Report Of Proceedings, page 5) At approximately 1:34 am, Officer McSwain was traveling eastbound on Slater Road when he observed a vehicle traveling westbound. RP 5. As the vehicle was approaching, it had its high beams on. RP 5. Officer McSwain flashed his lights to indicate the vehicle needed to switch to the low beams. RP 5. The vehicle did not dim its high beams. RP 5. Officer McSwain slowed down in order to turn in behind the vehicle. RP 8. As he slowed, the vehicle drifted across the center line into his land of travel. RP 8. The vehicle came within a couple of feet of his police vehicle. RP 8. Officer McSwain

came to an immediate stop, getting ready to swerve in case the vehicle continued toward him. RP 8. The vehicle then drifted back into the appropriate lane of travel. RP 8. The Officer then noticed that there was a second vehicle behind the first car which he had not seen before. RP 8-9. The Officer then turned around and positioned his car behind the two vehicles he had just observed with his emergency lights on. RP 9. He caught up to the vehicles just as they came to the intersection of Elder and Slater Roads. RP 10. Both vehicles pulled into a market at that location. RP 10. The second vehicle continued around behind the market where he could no longer see it while the first vehicle came to a stop at the gas pumps. RP 10. Officer McSwain observed the passenger exit the vehicle while the driver got into the passenger seat. RP 12. Officer McSwain commanded the driver and passenger to place their hands where he could see them and immediately called for backup assistance. RP 13. The driver was identified as LORETTA ERIKSEN. RP 5. Once backup arrived, Officer McSwain asked Ms. Eriksen why she jumped into the passenger seat. RP 15. She replied that she was not driving. RP 15. Officer McSwain indicated he had seen her driving and that she could be arrested for making false statements. RP 15. At that time, he observed Ms. Eriksen to have a very strong odor of intoxicants coming from Ms. Eriksen. RP 15. Her eyes

were bloodshot and watery. RP 15. Her speech was slightly slurred. RP 15. She was having difficulty keeping her balance and walking. RP 17. When Officer McSwain asked Ms. Eriksen to stop and face him, she began to sway back and forth. RP 17. Officer McSwain also observed that Ms. Eriksen was not a tribal member so he requested a deputy to respond in order to take over the investigation. RP 15. He advised Ms. Eriksen that she was not free to go. RP 17. Officer McSwain asked Ms. Eriksen to perform an HGN test but she refused. RP 18. A deputy responded to the scene and took over the investigation which resulted in Ms. Eriksen's arrest for DUI. RP 50.

D. Argument in Opposition to Discretionary Review

Eriksen petitions this court to review the Superior Court's decision to deny her RALJ appeal. Eriksen cannot demonstrate from a reasonable review of the record that the Superior Court committed any error by denying her RALJ appeal. None of the factors justifying discretionary review in RAP 2.3(d) are met by the ruling of the Superior Court in this case.

RAP 2.3(d) governs a motion for discretionary review of a Superior Court decision on review of a decision of a court of

limited jurisdiction. Pursuant to RAP 2.3(d), the court will accept review only:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

Eriksen fails to cite any legitimate reason why this court should grant her motion for discretionary review.

The Whatcom County Superior Court upheld the District Court decision that allowed Lummi Law and Order Tribal Officer McSwain to pursue Eriksen off the reservation, stop and detain her. The Whatcom County Superior Court reasoned:

> . . . then the question becomes what's the authority of the law enforcement officer from Lummi Law and Order to act in this case and I think that if I look at Schmuck, that dependent clause that I quoted to you a while back, is sufficiently ambiguous that Schmuck really doesn't tell us whether that means that there is a right to detain off reservation if the violation occurs on the reservation or if the detention must occur on the reservation . . . so then I

> think I have to look at the purposes of the sovereignty that has been granted and the way sovereignty has been negotiated between the Federal government and the tribes in the Point Elliott Treaty and in other cases that have come down . . . how that is to be interpreted.
>
> So, that being the case, then if that is going to be an effective policy and if the policy of the government and the theories that we see in the cases are that that sovereignty needs to be protected and needs to be given full force and effect, in order to do so, it seems to me that there is some inherent power that's involved in the detention and that inherent power is the ability to restrict freedom. It is the court's belief for that power to be effective and to be exercised in the way that the Federal government anticipates and that the Federal courts have anticipated, which is to protect the members of the tribal society and the tribal land, that is does require there to be a reasonable level of ability for the tribal officers to detain off reservation if it's clear that the incident that they are detaining for occurred on the reservation. Otherwise, I think we get to the problem that the Fresh Pursuit Statute addresses which is difficult in that the idea of a Fresh Pursuit Statute is to prevent this sort of thing happening between cities and counties and various cities of jurisdictions where they bounce right up against each other, so that this doesn't happen in those cases where somebody can just cross the line and be scot-free.

Petitioner's Appendix 1, pages 8-10.

1. <u>The Superior Court decision was not in conflict with a Court of Appeals or Supreme Court decision.</u>

In 1855, the Lummi Indian Tribe and the United States entered into the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, hereafter "Treaty." In <u>State v. Schmuck</u>, 121 Wn.2d 373, 383, the court held that a tribal

officer has inherent authority to stop a motorist on a public road within the reservation to investigate the possible violation of tribal law and to determine if the driver is a tribal member subject to tribal law. The Washington Supreme Court spoke in broad language when holding that a tribal officer could stop any motorist on the reservation:

> Fundamental to enforcing any traffic code is the authority by tribal officers to stop vehicles violating that code on roads within a reservation. In this case, Officer Bailey was exercising the Tribe's authority to enforce its traffic code when he observed the speeding pickup truck and pursued it through the streets of the Reservation. When he first saw the truck, he had no means of ascertaining whether the driver was an Indian. Only by stopping the vehicle could he determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. *Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless. It would also run contrary to the "well-established federal 'policy of furthering Indian self-government.'* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 56 L. Ed. 2d 106, 98 S. Ct. 1670, 1679 (1978) (quoting Morton v. Mancari, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474, 2483 (1974)).
>
> We hold Suquamish Tribal Officer Bailey had the requisite authority to stop Schmuck to investigate a possible violation of the Suquamish traffic code and to determine if Schmuck was an Indian, subject to the code's jurisdiction.

Schmuck, 121 Wn.2d at 382-83. (Emphasis added.)

Schmuck also held that the Tribe's authority to stop and detain non-tribal members did not exist under a citizen's arrest theory, but rather pursuant to the inherent power reserved by the Tribe in the Treaty:

> Finally, the State Patrol urges this court to base a tribal officer's authority to detain on a citizen's arrest theory. We decline their invitation. There would be a serious incongruity in allowing a limited sovereign such as the Suquamish Indian Tribe to exercise no more police authority than its tribal members could assert on their own. Such a result would seriously undercut a tribal officer's authority on the reservation and conflict with Congress' well-established policy of promoting tribal self-government. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978). *Potentially, DWI drivers would simply drive off or even refuse to stop if pulled over by a tribal officer with only a citizen's arrest capability.*
>
> *We conclude an Indian tribal officer has inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution.*

Schmuck, 121 Wn.2d at 392. (Emphasis added.)

Many other issues concerning a tribe's relationship with the state and federal government have been resolved. See, e.g., Duro v. Reina, 495 U.S. 676, 109 L. Ed. 2d 693, 110 S. Ct. 2053 (1990) (tribes retain their power of self-governance); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) (Indian tribal courts do not have inherent jurisdiction to try and punish non-tribal members who

commit crimes on their land); United States v. Wheeler, 435 U.S. 313, 323, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1979) (tribe's power of self-governance includes inherent power to prescribe laws for their members and to punish infractions of those laws); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992) (tribe has authority to enact a civil traffic code, including speed limits, which it can enforce against tribal members; State may not enforce its civil traffic regulations against tribal members driving on public roads within reservation).

The Superior Court's decision was not in conflict with the Schmuck case or any other decision of the Court of Appeals or Supreme Court. To the contrary, the court's reasoning follows the same reasoning presented in many cases regarding tribal jurisdiction. The court was simply interpreting the Schmuck case and applying it to the facts presented. Further, Petitioner has presented no cases which show a conflict with the Superior Court's ruling and previous case law.

2. Petitioner's case presents no issue of public interest that needs to be determined by an appellate court.

In determining whether an issue involves a sufficient public interest, the court must consider the public or private nature of the

question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence. Eide v. State, Dept. of Licensing, 101 Wash.App. 218, 223, 3 P.3d 208 (Wash.App. Div. 3, 2000). Petitioner argues that her case creates an issue of public interest because it has had significant impact on tribal law enforcement in Whatcom County. That statement is not accurate. The trial court's decision has no wide ranging effect on local tribal law enforcement, law enforcement officers of Whatcom County or law enforcement of any other jurisdiction, the citizens of Washington, or prosecutors. It is a decision that is limited to the facts of Eriksen's case. It has not created confusion for local law enforcement officers because they have not changed their actions or policies to reflect the decision in Eriksen's case. They consider it a case limited to its facts. Additionally, it is not precedent for the district or municipal courts in Whatcom County and they do not treat it as such. There is no clarification or guidance that needs to be given such as when there is a conflict between a statute and court rule. An appellate decision on the case at bar would be limited to the facts of this case. Further, Petitioner has presented no clear argument or case law as to why the issue creates a public interest that needs to be decided by an appellate court.

3. Petitioner's case presents no significant question of law under the Constitution.

Petitioner does not allege a significant question of Constitutional law in her brief. She simply states that the issue presented is "unique and of great constitutional significance" in her conclusion. Eriksen fails to analyze any Constitutional issues and therefore, fails to provide this court with any basis from which to grant her motion based on a Constitutional issue.

4. Petitioner has presented no basis for finding the Superior Court departed from the accepted and usual course of judicial proceedings.

Petitioner does not allege a basis for finding the Superior Court departed from the accepted and usual course of judicial proceedings in her brief. Eriksen fails to analyze this issue and therefore, fails to provide this court with any basis from which to grant her motion based on a departure from accepted and usual judicial proceedings.

E. Conclusion

Based on the preceding analysis, the respondent respectfully requests Eriksen's motion for discretionary review be denied.

DATED this 10th day of January, 2008.

Respectfully submitted,

Ann L. Stodola, #29182
Appellate Deputy Prosecutor
Attorney for Respondent

IN THE SUPREME COURT
FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. LORETTA L. ERIKSEN, Petitioner.	Case No. 80653-5 DECLARATION OF MAILING

I declare that on January 10, 2008, I deposited in the United States mails, with proper postage thereon, or caused to be delivered, a copy of the document to which this Declaration is attached directed to this Court and petitioner's counsel, WILLIAM JOHNSTON, addressed as follows:

WILLIAM JOHNSTON
401 Central Avenue
Bellingham, WA 98225

Ann L. Stodola, #29182

OFFICE RECEPTIONIST, CLERK

To: Ann Stodola
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Name of case = State of Wasington, Respondent v. Loretta L. Eriksen, Petitioner Case number = 80653-5 Submitted by = Ann L. Stodola, Whatcom Co. Appellate deputy, Bar #29182, email address astodola@co.whatcom.wa.us